

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X	<b>Docket#</b>	
LIXANDER MORALES,	:	14-cv-00485-ARR-LB
Plaintiff,	:	
	:	
- versus -	:	U.S. Courthouse
	:	Brooklyn, New York
	:	
UNITED STATES OF AMERICA,	:	
et al.,	:	July 17, 2015
Defendants	:	
-----X		

TRANSCRIPT OF CIVIL CAUSE FOR STATUS CONFERENCE  
BEFORE THE HONORABLE LOIS BLOOM  
UNITED STATES MAGISTRATE JUDGE

**A P P E A R A N C E S:**

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1 THE CLERK: Civil Cause for a Status  
2 Conference, docket number 14-cv-485, Morales v. United  
3 States of America, et al.

4 Will the parties please state your names for  
5 the record?

6 MR. VAN TOL: Good morning, your Honor.

7 Pieter Van Tol from Hogan Lovells for the  
8 plaintiff, Mr. Morales. I am joined by my colleague,  
9 Andrew Leff, also from Hogan Lovells. I should note for  
10 the record that Mr. Leff is not yet admitted to this  
11 Court but it is -- he's working on it.

12 THE COURT: It's imminent.

13 MR. VAN TOL: It's imminent.

14 THE COURT: Thank you.

15 MR. MARUTOLLO: Good morning, your Honor.

16 Joseph Marutollo for defendant United States of  
17 America and Dr. Dinesh Patel and with me is an intern  
18 from my office, Joshua Goldstein (ph.).

19 THE CLERK: The Honorable Lois Bloom presiding.

20 THE COURT: Good morning, Mr. Van Tol, Mr.  
21 Leff, Mr. Marutollo and Mr. Goldstein. Happy Friday to  
22 everybody.

23 MR. VAN TOL: Thank you, your Honor.

24 THE COURT: First I have to express my great  
25 full appreciation to Hogan Lovells and to you, Mr. Van

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1 Tol, for taking on this matter when we asked for pro bono  
2 counsel. We have looked over the case, as you saw. I  
3 did get counsel to retool the complaint but in order to  
4 get through what is essentially a medical care claim  
5 against the United States without counsel is virtually  
6 impossible. So we're very grateful that you have stepped  
7 forward to assist Mr. Morales, who I hope you've had the  
8 chance to meet with.

9 Mr. Marutollo, I never grant pro bono counsel  
10 unless I've had a number of conferences with a litigant.  
11 I am well aware, one, of the scarcity of the resources  
12 and two, that there are some cases that just should not  
13 take up that kind of resources but when somebody  
14 consistently tells the story, doesn't keep embellishing  
15 it with additional facts and quite frankly, there but for  
16 the grace of God, you know, anybody being incarcerated  
17 and having to have their teeth worked on, it has been  
18 something that you don't know this, Mr. Marutollo,  
19 because he's new in his office, but at the time that I  
20 got Mr. Morales' complaint, I got several other dental  
21 care cases regarding the same facility.

22 And that's not to say that I am jumping to any  
23 conclusion but you don't get to go out and shop for a  
24 dentist when you're in custody. You're given whoever  
25 you're given and here, you know, his claim is quite

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1 simply that during the extraction when the root broke  
2 which may be happens but the guy kept saying oh, this  
3 never happens, this never happens and continued to drill  
4 for an hour-and-a-half without taking an x-ray. That to  
5 me was something that I needed somebody other than the  
6 Court just to look into.

7           So, Mr. Marutollo, now that we have counsel on  
8 the other side, and even though Mr. Morales had said when  
9 we had spoken at a December 16th conference, that he  
10 wasn't interested in settlement, I'm hopeful that we can  
11 get through discovery and perhaps talk about how the case  
12 could be resolved.

13           And Mr. Van Tol, I don't know if you've had  
14 other federal tort claims act cases but -- have you?

15           MR. VAN TOL: I have not, your Honor, but  
16 people in my office are advising me. So I am well suited  
17 for that.

18           THE COURT: Well, the reason why I was going to  
19 say it is it is a malpractice case against -- it's a tort  
20 claim against the United States but there are some things  
21 that I am just going to put on the record. So when  
22 somebody names individuals like the case had been started  
23 when he brought it as a Bivens complaint, besides the  
24 Bivens complaint having a much higher standard which was  
25 deliberate indifference to serious medical need under the

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1 Eighth Amendment prescription against cruel and unusual  
2 harm, the biggest difference in my experience has been  
3 it's virtually impossible to get the government to settle  
4 a Bivens claim because they say that there has to be  
5 individual liability which Mr. Marutollo, I've met him  
6 because his supervisor brought him up when he was new and  
7 I know he comes from the City of New York, from the Corp.  
8 Counsel's office. The City has the same problem. When  
9 you name an officer, it's an individual being sued but  
10 it's the City that's going to pay.

11           Somehow the United States takes a very  
12 different position on it. They say oh, no, no, it's the  
13 individual, it's the individual. Well, I know the  
14 individual needs to be named but this is my long-winded  
15 way of saying that when you name the United States as an  
16 entity under a federal tort claims act, it comes out of a  
17 different pot.

18           The agency still has to resolve the case but  
19 somehow because it's not a Bivens claim against an  
20 individual, but it's a claim against the United States,  
21 even though it may still come out of the agency coffers,  
22 it's treated differently and it is something that I have  
23 had more success in getting federal tort claims act cases  
24 settled than getting Bivens claims settled. So --

25           MR. VAN TOL: Thank you, your Honor. That's

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1 very helpful. Thank you.

2 THE COURT: With that being said, we're sort of  
3 starting -- Mr. Marutollo's taking over and Ms.  
4 Soloveichik is not coming back on this case. This is  
5 yours now?

6 MR. MARUTOLLO: That's correct, your Honor.

7 THE COURT: Great. I'm glad to hear that.  
8 Nothing against her, just that I want to make sure that I  
9 have the people who are going to be working together on  
10 the case.

11 And, Mr. Leff, you're new to the firm?

12 MR. LEFF: Yes, I've been at the firm only a  
13 few months.

14 THE COURT: Is that because you just graduated?

15 MR. LEFF: Yes, I did last May.

16 THE COURT: Because you look like you're  
17 fifteen, I'm so sorry to say that.

18 MR. LEFF: I've gotten that before.

19 THE COURT: I'm sure I'm not the only one that  
20 said that to you.

21 MR. LEFF: No, your Honor.

22 THE COURT: Well, congratulations on your  
23 graduation.

24 MR. LEFF: Thank you.

25 THE COURT: And on landing at a good place.

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1 And I'm glad that you're coming in right away because  
2 that's the way to learn.

3 Okay. So I had set the deadline to complete  
4 fact discovery back in December but, of course, I had to  
5 stay discovery and extended it to July and August ut we  
6 know that that's not going to work.

7 So have the parties talked to each other about  
8 discovery and do you have proposals for what would be  
9 realistic?

10 MR. VAN TOL: Yes, your Honor. We have done --  
11 we have conferred and we have come up with a schedule  
12 which I hope is realistic. Of course it's at the Court's  
13 discretion but what we were hoping for is a fact  
14 discovery deadline of mid-December, 2015 and I believe th  
15 other two deadlines were expert disclosure and then  
16 expert depositions and those would be thirty days after  
17 that under our proposal, so mid-January 2016 for the  
18 disclosure and mid-February 2016 for the depositions.

19 I know a plaintiff, I should move the case  
20 forward and I would like to. We're gathering the  
21 documents. I think that's a doable schedule and we would  
22 like to adhere to it.

23 THE COURT: Well, that sounds good to me. The  
24 only thing that I would say in between is before you  
25 start investing -- now, usually the government is going

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1 to want -- I don't know whether they're going to want to  
2 do an exam of plaintiff under Rule 35 or they're just  
3 going to want their expert to review his records. Have  
4 we gathered the records, Mr. Marutollo?

5 MR. MARUTOLLO: We've gathered some of the  
6 records. Some document requests prior to counsel's  
7 involvement in the case have been outstanding and there  
8 were also some issues which we've raised with counsel and  
9 seem like that they will be resolved in terms of the  
10 execution of the releases and we were unable to get some  
11 of the records because the releases were incomplete when  
12 the plaintiff was appearing pro se.

13 So I think we do not have all of the records is  
14 the short answer to the question but additionally, I  
15 think in this case prior to any potential settlement  
16 conference, we may want to have either the plaintiff's  
17 deposition or an independent medical examination --

18 THE COURT: Or both perhaps.

19 MR. MARUTOLLO: -- or both perhaps.

20 THE COURT: Well, this is what I want to say.  
21 Because Hogan Lovells has taken on the case, that doesn't  
22 mean that it's not a pro bono case. So we want to try to  
23 conserve resources so that they'll take other cases in  
24 the future.

25 Toward that end, Mr. Van Tol, there is



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1 something called the Eastern District Civil Litigation  
2 Fund. You can find it on the web site of the Court and  
3 the rules are that you can get reimbursement but you have  
4 to request before you expend that funds for  
5 reimbursement. And quite frankly, even though it doesn't  
6 say it, since I'm a liaison to that board, they don't pay  
7 in any one case more than like \$5,000. So even if you  
8 need an expert, but that will help defray the cost. Some  
9 firms, quite frankly, don't ever come to the fund because  
10 that's not part of their issue. They'll foot their own  
11 bill. Other firms in order -- my reason for raising this  
12 to you is I would like your firm to want to take cases  
13 here and if that is in any way going to be the problem, I  
14 want you to know that there is this reimbursement fund.  
15 You make the application. It can take care of deposition  
16 transcripts and court reporters. It can take care of  
17 anything that would be paid for in a Criminal Justice Act  
18 case, can be paid for with the exception that it only  
19 goes to a certain limit. Okay?

20 MR. VAN TOL: Thank you, your Honor.

21 THE COURT: So, the reason why I said that is I  
22 do know that the government may need either an exam or a  
23 deposition or both or may need the expert that they are  
24 going to designate to review the records to see whether  
25 or not it was an actionable tort to keep drilling. I

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1 don't know. It makes my teeth hurt just thinking about  
2 it though. So that's sort of my threshold, Mr.  
3 Marutollo. If my teeth are hurting when I am reading the  
4 complaint, you know --

5 So I'm sorry, I'm not trying to make light of  
6 it but --

7 MR. MARUTOLLO: That's okay.

8 THE COURT: -- you understand. So in any  
9 event, I'll adopt the dates that you have proposed to the  
10 Court. They seem reasonable. I do want the parties to  
11 work together. I have no doubt that you'll be able to  
12 get a lot more accomplished now that Mr. Van Tol is on it  
13 and you're on it, Mr. Marutollo.

14 So, you're asking for mid-December. So let's  
15 say December 18th -- no, that's a Saturday. Wait. No,  
16 that's a Friday. December 18th to complete all  
17 discovery, 12/18/15 and then expert discovery, I am going  
18 to give you a little bit more than I usually would  
19 because I do want there to be time in between that  
20 perhaps we could meet and talk settlement.

21 So, January 31st for the expert reports and  
22 then the end of February is -- February 28th -- 2/28/16.  
23 So I'll adopt all of those and then Judge Ross has her  
24 own pre-motion conference rules. So thirty days from the  
25 close of expert would put us to March 28th. And I'll put

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1 this all in a record that you'll get by ECF.

2 But my hope is that you'll get through the fact  
3 discovery and you'll want to come to the table to talk  
4 about a way to resolve the case. One big difference in  
5 federal prisoners who are bringing civil rights claims or  
6 a federal torts claims act is if it's a state prisoner or  
7 a city prisoner, they have a big carrot and stick in the  
8 attorney's fee provision, which is 1988. Unfortunately,  
9 in federal prisoners claims, there is no corresponding  
10 statute.

11 Since Bivens was a creation of the Supreme  
12 Court as an analog to the mechanism under 42 U.S.C.  
13 Section 1983, and 1988 was passed at the same time as  
14 1983, but there's never been any analog under Bivens. So  
15 that is usually a -- this is all grist for the mill for  
16 future reference. Mr. Van Tol, that's usually a way that  
17 we can get City cases to resolve because when Hogan  
18 Lovells comes in on a City case, they don't want your  
19 attorney fee application at the end of the case. So they  
20 would rather settle with the plaintiff than to face your  
21 bill.

22 But in a federal case, we don't have that same  
23 carrot and stick or at least nobody has ever pointed me  
24 to any case where the -- under the Bivens remedy the  
25 Court has given attorneys fees. So the United States

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1 Attorney's Office knows that. They use that. That  
2 doesn't mean that we can't get cases resolved. So if  
3 when you're doing the research it looks like this is a  
4 case that should be resolved, I welcome you calling my  
5 chambers and getting a settlement conference.

6 Is Mr. Morales still incarcerated?

7 MR. VAN TOL: He is, your Honor. Yes.

8 THE COURT: And where is he?

9 MR. VAN TOL: At the Queens Detention Facility.

10 THE COURT: Okay. At least he's local, so if  
11 we needed him, it wouldn't be that difficult. So I'll  
12 set the deadlines that we've discussed on the record for  
13 fact discovery, expert reports and expert depositions and  
14 the pre-motion conference.

15 Were there any other matters that needed to be  
16 addressed today on behalf of Mr. Morales, Mr. Van Tol?

17 MR. VAN TOL: No, your Honor. Thank you very  
18 much.

19 THE COURT: Thank you. Anything further, Mr.  
20 Marutollo --

21 MR. MARUTOLLO: No, your Honor.

22 THE COURT: -- on behalf of the United States?

23 Then, thank you very much. I will leave it in  
24 your good hands and please contact my chambers if I could  
25 be helpful. Thank you.

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1 MR. MARUTOLLO: Thank you, your Honor.

2 MR. VAN TOL: Thank you.

3 MR. MARUTOLLO: Have a good weekend.

4 THE COURT: You, too.

5 (Matter concluded)

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C E R T I F I C A T E

I, LINDA FERRARA, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this 4th day of November, 2015.



Linda Ferrara

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